AirAsia Bhd & Anor v Malaysia Airports (Sepang) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23NCVC-56–10 OF 2019
MOHD ARIEF JC
25 MARCH 2022

Civil Procedure — Striking out — Statement of claim — Plaintiffs filed action against defendant premised on breach of contract and negligence — Defendant filed application to strike out plaintiffs' statement of claim — Whether parties entered into settlement agreement — Whether plaintiffs' action was abuse of process because issues raised in plaintiffs' action had been raised in previous suits — Whether plaintiffs' action barred by res judicata — Rules of Court 2012 O 18 r 19(1)

The plaintiffs had filed an action against the defendant for, inter alia, breach of duty of care and/or breach of contractual obligation for failing to ensure that the plaintiffs were able to use KLIA 2 in an efficient manner and that the defendant was guilty of negligence. In opposing the plaintiffs' action, the defendant filed the present application to strike out the plaintiffs' statement of claim under O 18 r 19(1)(b) and/or (c) and/or (d) of the Rules of Court 2012. The defendant argued that: (a) the plaintiffs' claim was an abuse of court's process as the same issue had been raised and litigated before the High Court in the three earlier proceedings by way of summary judgment and before the Malaysia Aviation Commission ('MAVCOM') — the earlier suits were concerning the Passenger Service Charges ('PSC rates') that were chargeable under the Malaysian Aviation Commission (Aviation Services Charges) (Amendment) Regulation 2017 and the contracts between the parties namely the Conditions of Use 2017 ('COU 2017'); (b) the plaintiffs were subject to the doctrine of res judicata and should not be allowed to abuse the processes of the court — the present suit was an attempt by the plaintiffs to challenge the decision of the courts in the earlier suits by way of a collateral attack in these proceedings; (c) the plaintiffs were guilty of abusing the process of the court by filing the present suit when the issues raised herein could have been raised and should have been raised in the earlier proceedings between the same parties; (d) the plaintiffs were blowing hot and cold at the same time — in the earlier suits the plaintiffs challenged the validity of the COU 2017 and denied the validity of the said charges but in the present suit they relied on the said agreement to impose liability on the defendant; and (e) the plaintiffs and the defendant had entered into a settlement agreement as contained in the letters dated 17 July 2020, 25 August 2020 and 11 September 2020 ('the letters'), whereby the parties agreed, inter alia, for the withdrawal of the suits pending

before the Malaysian courts without liberty to file afresh and with no order as to costs. A

Held, dismissing the defendant's application with costs in the cause:

(1) It was trite law that for the court to find that the parties had entered into a binding agreement, it must consider whether parties agreed as to the material terms of the settlement. The court had considered the letters and found that the parties did not come to an agreement as to the exact terms of the settlement agreement, in particular the PSC rates chargeable to the plaintiffs. There was also disagreement as to the scope of the settlement and whether the sums that were chargeable and found payable by the summary judgment orders of the court were part and parcel of the terms of a settlement. Therefore, there was no settlement agreement entered between the parties. Under those circumstances, the court expunged the letters from the court's records for the purposes of the trial and the letters would not be referred to hereafter by either party at trial. Under those circumstances, the court also found that as there was no settlement, the issues raised in the letters were live issues in contention between the plaintiffs and the defendant subject to the requirement of strict adherence to the pleadings (see paras 24, 26, 35 & 37). B C D E

(2) The decision of the courts in the earlier suits did not preclude the plaintiffs from filing the present action against the defendant. In the earlier suits, the learned judge did not deal with the merits of the plaintiffs' claim for breach of contract or negligence as alleged. Further, the claim for breach of contract, negligence and damages sought for failure to perform the contract was separate and distinct from the claim of the PSC charges by the defendant. As the learned judge in the earlier suits did not deal specifically with precision on the issue of the alleged claims pending in the present action, the plaintiffs' claim herein was therefore not barred by res judicata in the narrower sense ie the cause of action estoppel (see paras 42, 45, 48 & 56). F G

(3) The previous court had only found that the right of set off was removed by the terms of the agreement and therefore the sums due under the same became payable in full. The court could not say at this stage that because of the right of set off was precluded by the terms of the contract, the plaintiffs was not entitled to file a counterclaim. If the clause prevented the plaintiffs from pursuing its claim totally against the defendant, then such a clause may fall foul of s 29 of the Contracts Act 1950. The court was of the view that this issue should be dealt with and determined by way of a full trial and not summarily at this interlocutory stage (see paras 48 & 53). H I

(4) As the plaintiffs were entitled to bring a separate counterclaim to address their grievances and that this was a separate claim to those raised by the defendant in the earlier suits, the plaintiffs were not subjected to the rule in *Henderson v Henderson* (1843) 3 Hare 100. This suit was not an abuse of the process of the court and did not abrogate from the rule that all the claims that should have been raised in the civil suit be raised in a single proceeding. The court did not find that there was any risk that even if this claim was decided in favour of the plaintiffs, the judgment of this court would contradict the judgment of the learned judge in the earlier suits. The current claim was independent to the suits filed for the charges allegedly claimable by the defendant. The same applied to the claim filed by the plaintiffs against the decision of MAVCOM (see paras 61–62).

(5) On the issue of approbating and reprobating, this argument did not render the plaintiffs' claim abusive. Such an argument should be raised as part of the merits of the claim and would be considered as it went to the consistency and validity of the plaintiffs' claim. The defendant's allegation on this issue did not justify the striking out of the plaintiffs' claim. However, the defendant was entitled to rely on this defence during the course of the trial. The court refused to make any final determination on this issue until disposal of the trial (see paras 63–64).

(6) Based on the above findings, the plaintiffs' claim was not subjected to the doctrine of res judicata in any of the limbs suggested by the defendant (see para 65).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan tindakan terhadap defendan kerana, antara lain, pelanggaran kewajipan berjaga-jaga dan/atau pelanggaran kewajipan kontrak kerana gagal memastikan plaintif-plaintif dapat menggunakan KLIA 2 dengan berkesan dan defendan bersalah atas kecuaian. Dalam menentang tindakan plaintif-plaintif, defendan memfailkan permohonan semasa untuk membatalkan pernyataan tuntutan plaintif di bawah A 18 k 19(1)(b) dan/atau (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012. Defendan berhujah bahawa: (a) tuntutan plaintif-plaintif adalah penyalahgunaan proses mahkamah kerana isu yang sama telah dibangkitkan dan dibicarakan di hadapan Mahkamah Tinggi dalam tiga prosiding terdahulu melalui penghakiman ringkas dan di hadapan Suruhanjaya Penerbangan Malaysia ('MAVCOM') — saman-saman terdahulu adalah mengenai Caj Perkhidmatan Penumpang ('caj PSC') yang dikenakan di bawah Peraturan Suruhanjaya Penerbangan Malaysia (Caj Perkhidmatan Penerbangan) (Pindaan) 2017 dan kontrak antara pihak-pihak iaitu 'Conditions of Use 2017' ('COU 2017'); (b) plaintif-plaintif tertakluk kepada doktrin res judicata dan tidak seharusnya dibenarkan menyalahgunakan proses mahkamah — saman semasa adalah percubaan oleh plaintif-plaintif untuk mencabar keputusan mahkamah dalam saman-saman terdahulu melalui 'collateral attack' dalam prosiding ini; (c)

plaintif-plaintif bersalah menyalahgunakan proses mahkamah dengan memfailkan saman semasa sedangkan isu yang dibangkitkan di sini boleh dibangkitkan dan sepatutnya dibangkitkan dalam prosiding terdahulu antara pihak-pihak yang sama; (d) plaintif-plaintif 'blowing hot and cold at the same time' — dalam saman terdahulu plaintif-plaintif mencabar kesahihan COU 2017 dan menafikan kesahihan caj tersebut tetapi dalam saman semasa mereka bergantung pada perjanjian tersebut untuk mengenakan liabiliti pada defendan; dan (e) plaintif-plaintif dan defendan telah memeterai perjanjian penyelesaian seperti yang terkandung dalam surat bertarikh 17 Julai 2020, 25 Ogos 2020 dan 11 September 2020 ('surat-surat tersebut'), di mana pihak-pihak bersetuju, antara lain, untuk penarikan balik saman-saman yang belum selesai di mahkamah Malaysia tanpa kebebasan untuk memfailkan semula dan tanpa perintah mengenai kos.

Diputuskan, menolak permohonan defendan dengan kos di dalam kausa:

(1) Sudah menjadi undang-undang yang mantap bahawa untuk mahkamah mendapati bahawa pihak-pihak telah memeterai perjanjian yang mengikat, ia mesti mempertimbangkan sama ada pihak-pihak telah bersetuju dengan terma-terma material dalam perjanjian penyelesaian tersebut. Mahkamah telah mempertimbangkan surat-surat tersebut dan mendapati bahawa pihak-pihak tidak mencapai persetujuan tentang terma-terma yang tepat bagi perjanjian penyelesaian tersebut, khususnya caj PSC yang dikenakan kepada plaintif-plaintif. Terdapat juga perselisihan pendapat mengenai skop penyelesaian dan sama ada jumlah yang boleh dikenakan dan didapati perlu dibayar oleh perintah penghakiman ringkas mahkamah adalah sebahagian daripada syarat penyelesaian tersebut. Oleh itu, tidak ada perjanjian penyelesaian yang dimeterai antara pihak-pihak. Dalam keadaan tersebut, mahkamah menghapuskan surat-surat tersebut daripada rekod mahkamah untuk tujuan perbicaraan dan surat-surat tersebut tidak akan dirujuk selepas ini oleh mana-mana pihak dalam perbicaraan. Di bawah keadaan tersebut, mahkamah juga mendapati bahawa oleh kerana tiada penyelesaian, isu-isu yang dibangkitkan dalam surat-surat tersebut adalah isu-isu langsung dalam perbalahan antara plaintif-plaintif dan defendan tertakluk kepada keperluan pematuhan ketat kepada pliding (lihat perenggan 24, 26, 35 & 37).

(2) Keputusan mahkamah dalam saman-saman terdahulu tidak menghalang plaintif-plaintif daripada memfailkan tindakan semasa terhadap defendan. Dalam saman-saman terdahulu, hakim yang bijaksana tidak menyentuh merit tuntutan plaintif-plaintif bagi pelanggaran kontrak atau kecuaian seperti yang didakwa. Selanjutnya, tuntutan pelanggaran kontrak, kecuaian dan ganti rugi yang dipohon kerana kegagalan melaksanakan kontrak adalah tuntutan yang berasingan dan berbeza daripada tuntutan caj PSC oleh defendan. Oleh kerana hakim yang

bijaksana dalam saman-saman terdahulu tidak menangani secara khusus dengan ketepatan mengenai isu tuntutan yang masih belum selesai dalam tindakan semasa, maka tuntutan plaintif-plaintif di sini tidak dihalang oleh res judicata dalam erti kata yang lebih sempit iaitu estoppel kausa tindakan (lihat perenggan 42, 45, 48 & 56).

(3) Mahkamah dalam saman-saman terdahulu hanya mendapati bahawa hak tolakan telah dihapuskan oleh terma-terma perjanjian dan oleh itu jumlah yang perlu dibayar di bawah perjanjian tersebut menjadi perlu dibayar sepenuhnya. Mahkamah tidak boleh mengatakan pada peringkat ini bahawa kerana hak tolakan telah dihalang oleh terma-terma kontrak, plaintif-plaintif tidak berhak untuk memfailkan tuntutan balas. Jika klausa tersebut menghalang plaintif-plaintif daripada meneruskan tuntutannya sepenuhnya terhadap defendan, maka klausa tersebut mungkin melanggar s 29 Akta Kontrak 1950. Mahkamah berpendapat bahawa isu ini harus ditangani dan ditentukan dengan cara perbicaraan penuh dan bukan secara ringkas pada peringkat interlokutori ini (lihat perenggan 48 & 53).

(4) Memandangkan plaintif-plaintif berhak untuk membawa tuntutan balas yang berasingan untuk menangani permasalahan mereka dan memandangkan ini adalah tuntutan berasingan daripada tuntutan yang dibangkitkan oleh defendan dalam saman-saman terdahulu, plaintif-plaintif tidak tertakluk kepada peraturan dalam *Henderson v Henderson* (1843) 3 Hare 100. Saman ini bukan penyalahgunaan proses mahkamah dan tidak menyimpang daripada peraturan bahawa semua tuntutan yang sepatutnya dibangkitkan dalam saman sivil mesti dibangkitkan dalam satu prosiding yang sama. Mahkamah tidak mendapati bahawa terdapat apa-apa risiko walaupun tuntutan ini diputuskan memihak kepada plaintif-plaintif, bahawa penghakiman mahkamah ini akan bercanggah dengan penghakiman hakim yang bijaksana dalam saman-saman terdahulu. Tuntutan semasa adalah bebas daripada saman-saman yang difailkan untuk caj yang didakwa boleh dituntut oleh defendan. Perkara yang sama terpakai untuk tuntutan yang difailkan oleh plaintif-plaintif terhadap keputusan MAVCOM (lihat perenggan 61–62).

(5) Mengenai isu 'approbating and reprobating', hujah ini tidak menyebabkan tuntutan plaintif-plaintif menyalahgunakan proses mahkamah. Hujah sedemikian harus dibangkitkan sebagai sebahagian daripada merit tuntutan dan akan dipertimbangkan kerana ia melibatkan konsistensi dan kesahihan tuntutan plaintif-plaintif. Dakwaan defendan mengenai isu ini tidak mewajarkan pembatalan tuntutan plaintif-plaintif. Bagaimanapun, defendan berhak bergantung kepada pembelaan ini semasa perbicaraan berlangsung. Mahkamah enggan membuat apa-apa penentuan muktamad mengenai isu ini

sehingga perbicaraan diselesaikan (lihat perenggan 63–64). A

(6) Berdasarkan dapatan-dapatan di atas, tuntutan plaintif-plaintif tidak tertakluk kepada doktrin res judicata dalam mana-mana bahagian yang dicadangkan oleh defendan (lihat perenggan 65).]

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Cases referred to

Au Yong Kun Min v Tractors Malaysia Bhd [1996] MLJU 613, HC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd) C

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2018] 1 LNS 1887, FC (refd) D

Charles Greenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors (No 2) [1999] 4 MLJ 94, HC (refd)

Eng Mee Yong v Letchumanan [1979] 2 MLJ 212; [1979] 1 LNS 18, PC (refd) E

Heaton and others v AXA Equity and Law Life Assurance Society plc and another [2002] 2 AC 329, HL (refd)

Henderson v Henderson (1843) 3 Hare 100 (folld)

Jameson and another v Central Electricity Generating Board [1999] 2 WLR 141, HL (refd) F

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)

Nowran Begam binti Mohamed Saliff (Pentadbir Hart Pusaka Mohamed Ihsan bin Saiyed Abu Thahir, si mati) v Nantha Kumar Devar a/l Sangaran & Anor (CTRM Aviation Sdn Bhd, intervener) [2016] MLJU 226; [2016] 7 CLJ 760, HC (refd) G

Om Cahaya Mineral Asia Bhd v Damansara Realty (Pahang) Sdn Bhd [2019] 1 MLJ 683; [2018] 5 CLJ 587, CA (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157; [1985] CLJ Rep 242, FC (refd) H

Prestasia Sdn Bhd v Mow Wai Lan [1997] 2 MLJ 236, CA (refd)

Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor [2019] 2 MLJ 154, FC (refd)

Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473; [2012] 1 CLJ 75, CA (refd) I

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160, SC (refd)

Legislation referred to

Contracts Act 1950 ss 29, 30
Rules of Court 2012 O 15 r 2, O 18 r 19, 19(1)(b), (1)(c), (1)(d)

Gopal Sreenevasan (with Jeremiah Rais and Talitha Shim) (Sreenevasan Young) for the plaintiff.
Eric Gomez (with Shannon Rajan and Ivan Loo) (Skrine) for the defendant.

Mohd Arief JC:

INTRODUCTION

[1] The defendant seeks to strike out the plaintiffs' statement of claim against it under O 18 r 19(1)(b) and/or (c) and/or (d) of the Rules of Court 2012 (encl 8).

[2] The defendant contends that:

(a) the plaintiffs' claim is an abuse of process of this court as the same issue has been raised and litigated before the High Court in the earlier proceedings bearing number WA-22NCVC-58–01 of 2019, WA-22NCVC-817–12 of 2018 and WA-22NCVC-816–12 of 2018;

(b) the plaintiffs are subject to the doctrine of res judicata and should not be allowed to abuse the processes of this court. This suit is an attempt by the plaintiffs to challenge the decision of the courts in the above-mentioned suits by way of a collateral attack in these proceedings;

(c) the plaintiffs are guilty of abusing the process of court by filling this current suit when the issues raised herein could have been raised and should have been raised in the earlier proceedings between the same parties;

(d) the plaintiffs are blowing hot and cold at the same time. In the earlier suit they challenge the validity of the COU 2017 and denies the validity of the said charges but at the same time they now rely on the said agreement to impose liability on the defendant; and

(e) the plaintiffs and the defendant had entered into a settlement agreement as contained in the letters dated 17 July 2020, 25 August 2020 and 11 September 2020, whereby parties agreed, inter alia, for the withdrawal of the suits pending before the Malaysian courts without liberty to file afresh and with no order as to costs.

CHRONOLOGY OF EVENTS AND THE PLAINTIFFS' CLAIM

[3] It is important that I first laid down the chequered history of the relationship between parties, especially those relating to the suits filed by the litigants before our courts.

[4] The following proceedings were initiated by the defendant against the defendants:

(a) Suit No WA-22NCVC-816–12 of 208 for, inter alia, RM9,395,865.50 that is allegedly outstanding and payable by the second plaintiff;

(b) Suit No WA-22NCVC-817–12 of 2018 for, inter alia, RM27,718,142 that is allegedly outstanding and payable by the first plaintiff; and

(c) Suit No WA-22NCVC-58–01 of 2019 for, inter alia, RM4,614,329.09 that is allegedly outstanding and payable by the first plaintiff.

[5] The above suits were concerning the Passenger Service Charges (PSC rates) that were chargeable under the Malaysian Aviation Commission (Aviation Services Charges) (Amendment) Regulation 2017 and the contracts between the parties namely the Conditions of Use 2017 (COU 2017).

[6] Summary judgments applications and striking out applications were filed by the litigants in the earlier referred suit. The High Court had allowed the defendant's applications for summary judgment and dismissed the plaintiffs' application to strike out the suit on 18 July 2019.

[7] The plaintiffs had attempted to refer the dispute between parties to be determined by the Malaysia Aviation Commission (MAVCOM) as seen in the letters dated 18 February 2019 and 14 March 2019 from the plaintiffs' former solicitors to MAVCOM. MAVCOM declined jurisdiction as seen in the letters issued by the said body dated 28 February 2019 and 18 March 2019.

[8] Dissatisfied with the decision by MAVCOM, the plaintiffs commenced its judicial review application against the said body's refusal to hear the dispute as seen in the suit bearing number WA-25–214–05 of 2019. The plaintiffs' application for leave to commence judicial review was however dismissed by the High Court on 25 June 2019.

[9] The plaintiffs then filed the current writ and its statement of claim against the defendant. In this suit, the plaintiffs contend:

(a) that the defendant acted in breach of its duties of care and/or had acted in breach of its contractual obligation for failing to ensure that the plaintiffs were able to use KLIA 2 in an efficient manner;

(b) that the runaway and the facilities of KLIA 2 are defective and caused damage to the plaintiffs' equipment, aircraft, personnel, caused unplanned runway closures, and prolonged and operational disruptions;

(c) that there was damage to the fibre optic cables to the plaintiffs operations building that led to a total loss of internet connectivity and disruption of work for the plaintiffs;

(d) the defendants were guilty of negligence; and

(e) that the damage claimable against the plaintiffs was to the sum of RM479,781,285.

[10] In the midst of the current proceedings, the senior management of the litigants started communications with the intention of resolving the issues amicably.

[11] I list down the relevant letters issued by various parties including the Group Chief Executive Officer of the first plaintiff and the Group Chief Executive Officers of the defendants.

(a) letter issued by the defendant to the plaintiffs dated 22 May 2020;

(b) letter from the plaintiffs to the defendant dated 19 June 2020;

(c) letter from the defendant to the plaintiff dated 29 June 2020;

(d) letter from the plaintiffs to the defendant dated 9 July 2020;

(e) two letters from the plaintiffs to the defendant dated 17 July 2020;

(f) letter from the plaintiffs to the defendant dated 27 July 2020;

(g) letter from the plaintiffs to the defendant dated 8 August 2020;

(h) letter from the defendant to the plaintiff dated 25 August 2020;

(i) letter from the plaintiffs to the defendant dated 11 September 2020;

(j) letter from Messrs Skrine, solicitors acting for the defendant, to the plaintiffs dated 18 September 2020;

(k) letter from Messrs Sreenevasan Young plaintiffs' solicitors, to Messrs Skrine dated 28 September 2020;

(l) letter from Messrs Skrine to the Messrs Sreenevasan Young dated 9 November 2020;

(m) letter from Messrs Sreenevasan Young to Messrs Skrine dated 10 November 2020 and 13 November 2020;

(n) letter from Messrs Skrine to Court dated 28 September 2020; and

(o) emails exchanged between Messrs Skrine and Messrs Sreenevasan Young dated 28 September 2020.

I also refer to the notes of proceedings of this court dated 2 October 2020.

APPLICABLE PRINCIPLES — STRIKING OUT

[12] I reproduce the O 18 r 19 of the Rules of Court 2012:

19 Striking out pleadings and endorsements (O 18 r 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous, or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[13] The applicable law in this area is trite and has been explained in the decisions of the courts in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75 and *Om Cahaya Mineral Asia Bhd v Damansara Realty (Pahang) Sdn Bhd* [2019] 1 MLJ 683; [2018] 5 CLJ 587.

[14] It is trite that if the pleadings disclose a reasonable cause of action and if it could be shown that there are 'issues of law that need to be elaborated and argued in great detail and for mature consideration' then this court should not strike out the suit.

[15] I am also aware that this court should also consider if there are relevant factual issues that require deliberation of the facts through witnesses. If there are such issues, this court should not utilise its powers to strike out the claim under O 18 r 19 of the Rules of Court 2012.

[16] Nonetheless, I am aware of my duty to consider the claim and the affidavit evidence in totality to determine whether there exists a reasonable cause of action that ought to be referred to at trial. For this purpose, I refer to the judgment of Mohd Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, where His Lordship quoted the judgment of the Privy Council in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18, which is reproduced herein:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

DECISION OF THIS COURT

[17] I have considered the affidavits, submissions filed, and the arguments raised by the learned counsel for the plaintiffs and the defendant.

[18] I find that the plaintiffs' claim should not be struck out as suggested by the defendant.

[19] I do not find that there was a conclusive and binding agreement between parties to amicably resolve all disputes pending at the material time. I also do not agree that the plaintiffs are barred from pursuing their claims in this suit on the doctrine of res judicata either in the narrow or in the wider sense. My detailed reasons are contained in the following paragraphs.

THERE WAS NO SETTLEMENT AGREEMENT CONCLUDED BETWEEN THE PLAINTIFFS AND THE DEFENDANT

[20] The dispute as to the amount allegedly due and payable between the plaintiffs and the defendant relate to the passenger service charges that were imposed in accordance with the Malaysian Aviation Commission (Aviation Services Charges) (Amendment) Regulation 2017 and under the contracts between the parties namely the Conditions of Use 2017 (COU 2017).

[21] The defendant contends that the chargeable rate for any departures from all domestic airports to any non-Asean international destination is at the rate of RM67 per passenger, whereas the plaintiffs contend that the rate should be at the sum of RM44 per passenger. The sums non-disputed of RM44 per passenger are referred to by parties as 'undisputed PSC' and the difference of RM23 per passenger (between the alleged RM67 and RM44 (undisputed PSC)) is referred to as 'disputed PSC'.

[22] I find that the issues that were in dispute between parties could be summarised as follows: A

(a) the undisputed PSC that was outstanding as of 30 June 2020;

(b) the disputed PSC as of 30 June 2020; B

(c) non-PSC charges outstanding as of 30 June 2020;

(d) late payment charges;

(e) exercise of the Airline Incentive Programme 2017 (AIP 2017); and

(f) PSC charges are the subject matter of the pending appeals at the Court of Appeal. C

[23] Parties were also in a dispute concerning the sums due and payable by the plaintiffs to the defendants as seen in the following suits filed by the defendant against the plaintiffs: D

(a) Suit No WA-22NCVC-816–12 of 208 for, inter alia, RM9,395,865.50 that is allegedly outstanding and payable by the second plaintiff;

(b) Suit No WA-22NCVC-817–12 of 2018 for, inter alia, RM 27,718,142 that is allegedly outstanding and payable by the first plaintiff; and E

(c) Suit No WA-22NCVC-58–01 of 2019 for, inter alia, RM 4,614,329.09 that is allegedly outstanding and payable by the first plaintiff.

F

[24] It is trite law that for this court to find that parties had entered into a binding agreement, it must consider whether parties were at ad idem as to the material terms of the settlement. I refer to the judgment of Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 where His Lordship stated: G

> Broadly stated the result of this appeal depends upon the answer to the question whether, having regard to the circumstances outlined above, the letter of 19 September 1984 embodies any contractual obligations between the parties.
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> In *Smith v Hughes* [1871] LR 6 QB 597 it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them. H
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> But, bearing in mind the familiar saying that person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract. I

In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

As clear and helpful an enunciation of the principles as any which should guide the court in determining the ever recurring question of whether there has been a contract between the parties is provided by *Saville J in Vitol BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574, at p 576 in the following words:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[25] The approach that this court should apply, in making its determination whether there exists a settlement agreement as contended by the defendant, is laid down by Gopal Sri Ram JCA (as he then was) in *Charles Greenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 where he stated:

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.
>
> Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER (Rep) 494, where he said:
>
> > Businessmen often record the most important agreements in crude and

summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law,*verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99.

[26] I have considered the letters exchanged between the plaintiffs and the defendants and I find that parties did not come to an agreement as to the exact terms of the settlement agreement, in particular the PSC amount chargeable to the plaintiffs.

[27] I find that the plaintiffs believed that the said PSC rate will be reduced to RM50, its original amount charged, instead of the revised amount of RM63 or RM73 as directed by MAVCOM. The plaintiffs also believed that the term of settlement would include an agreement by the parties to at the very least approach MAVCOM to reduce the current PSC rate to its original rate and this would take effect from 1 July 2018 being the original date of the dispute between parties. This would have included the sums ordered to be paid by the High Court summarily and now pending the plaintiffs appeals before the Court of Appeal.

[28] Whereas the defendant, on the other hand, believed that the terms of the settlement did not include the disputed PSC rate and did not include the amount ordered to be paid by the High Court in the above-referred suits.

[29] This is reflected in the letters exchanged between the parties referred to below. I have highlighted the material portions of the letters that indicate to me objectively that parties were not ad idem on the terms of the settlement:

(a) letter dated 9 July 2020 from the plaintiffs to the defendant:

1. Pending Legal Proceedings

Both parties seek to withdraw all legal proceedings outstanding between MAHB and/or MA Sepang against AAB and AAX, based on the resolution of items outlined in point 2 below.

2. PSC Payments Due and & Incentives Outstanding

In the interest of reaching a mutual agreement, we will concurrently have discussions around PSC dues to MAHB and incentives due to us. We are agreeable to resolving outstanding amounts related to 2020 PSC dues to MAHB to be paid in two tranches, on the dates to be mutually agreed by both parties, and at the same time, we seek reciprocity from MAHB and/or MA Sepang in payment of the incentives for the period 2017–2019 that are outstanding to us in similar tranches on the same dates.

...

With the above actions, we are seeking an amicable withdrawal/settlement of the legal cases and legal cost to be borne by respective parties, and also a resolution of the PSC payments due to MAHB as well as the incentives outstanding that are due to us.

(b) letter dated 17 July 2020 from the plaintiffs to the defendant:

An amicable resolution achieved by parties as follows:

1. PSC Payments due and & Incentives outstanding

With both parties sitting down this past Monday, with final calculations mutually agreed that PSC outstanding as of 30th June 2020 from AirAsia will be made today, 17 July 2020 upon offsetting the incentives that are undisputed and due to AirAsia for 2017.

Incentives for 2018 and 2019 agreed in our meeting to be discussed further and with a target to finalise the matter by the third quarter of 2020.

2. Pending legal proceedings

Having achieved the above and with reference to amicable resolutions proposed in YBHG Dato's letters dated 22nd May 2020 and 29th June 2020 both the parties further agree to withdraw all legal proceedings outstanding between MAHB and/or MA Sepang against AAB and AAX with no order as to costs against each other.

(c) letter dated 25 August 2020 issued by the defendant to the plaintiffs (retracting the letter dated 27 July 2020):

2. Based on numerous discussions between the parties the following are the principles in relation to the settlement of the undisputed passenger service charges (PSC)

(a) AAB is to pay the undisputed PSC

(b) 50% discount on late payment charges pertaining to undisputed PSC only from 12% to 6%

(c) We will use our discretion to grant you the Airline Incentive Programme (AIP) 2017 to set off the outstanding undisputed PSC; and

(d) AAB will pay the remaining balance in cash therefrom.

...

5. As the undisputed PSC as at 30.6.2020 as aforementioned has been fully settled, the parties shall forthwith withdraw all their respective pending suits against each other in the High Court with no order as to costs and with no liberty to file afresh.

(d) letter from the plaintiffs dated 11 September 2020 to the defendant:

We confirm that we are agreeable to the terms of settlement as set out in your letter for the pending legal suits between AirAsia and Malaysia Airports (Sepang) Sdn Bhd and record our appreciation for your assistance in resolving this matter.

...

We also refer to the meetings and communication between both parties concerning the issue surround the PSC of RM 50 vs RM 73 whereby both parties have agreed to jointly approach MAVCOM to support the PSC at RM 50 (instead of RM 73) and for MAVCOM to formally gazette the revision of the PSC back to RM 50 commencing on and from 1 July 2018 being the date when the dispute arose between us.

[30] This also appears in the letters exchanged between the solicitors:

(a) letter from Messrs Skrine to the plaintiffs dated 18 September 2020:

'Pending issues between the parties'

5. For the avoidance of doubt, we are instructed and hereby confirm that the following issues have yet to be resolved and/or agreed between the parties.

a. With specific reference to paragraph 5 of your respective letters dated 11 September 2020, there has never been any agreement by our Clients to jointly approach the Malaysian Aviation Commission ('MAVCOM') to support a reduction in the PSC rate for long-haul flights departing from KLIA2 from RM73 to RM50, and for the same to be formally gazetted. We are instructed that the difference between this PSC rate is disputed by the parties and has thus far been expressly excluded from the scope of the settlement negotiations. We are further instructed that is well documented in the settlement correspondence.

b. There remains an outstanding sum due and owing by AAB to our clients in the sum of RM 56,583,559.93 as at 31 August 2020. The particulars of the claim are enclosed in Appendix-A.

(b) letter from Messrs Sreenevasan Young to Messrs Skrine dated 13 November 2020:

Our client instructs us to proceed with the captioned proceedings, as there are certain matters yet to be resolved vis-à-vis the settlement negotiations between our respective clients.

[31] The plaintiffs believed that the settlement would have included all disputes, including the appeals before the Court of Appeal on the disputed PSC charges. This is clear in the language used by the plaintiffs in the letters referred to earlier, when it said that the parties have agreed to approach MAVCOM 'to formally gazette the revision of the PSC back to RM50 commencing on and from 1 July 2018 being the date when the dispute arose between us'. If this step had taken place, then the outcome of the appeals concerning the disputed PSC will have to be resolved in favor of the plaintiffs as the sums would need to follow the change in the PSC rate.

[32] This understanding was rebuked by the defendant's solicitors as seen in the afore referred letter dated 10 September 2020, delineating the PSC charges that are subject to the summary judgment orders entered in the above-mentioned civil suits from the terms of the alleged settlement agreement.

[33] I refer to the decision of the Federal Court in *Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor* [2019] 2 MLJ 154.

> [20] What amounts to a concluded contract is a matter of fact and law. The law is as prescribed in s 7(a) of the Contracts Act 1950 which reads as follows:
>
> 7. Acceptance must be absolute
>
> In order to convert a proposal into a promise the acceptance must:
>
> (a) be absolute and unqualified;
>
> [21] What s 7(a) says is simply this. For any concluded agreement to come into existence, there must be a clear and definite offer by the proposer and an 'absolute and unqualified' acceptance of the same by the offeree. The phrase 'absolute and unqualified' is critical in that any acceptance coupled with any condition can never be an 'absolute and unqualified' acceptance. It must be absolute in that all terms set out in the offer must be accepted. It must be unqualified in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table so to speak, the parties are simply back to the negotiating mode as there is now a counter-offer by the offeree which in effect rejects the proposal. Withdrawal of the conditional acceptance per se would not revive the original offer. Only an absolute and unqualified acceptance of the counter-offer by the proposer will there be a concluded contract between the proposer and offeree.
>
> [22] As to what should be the approach to employ in unraveling the factual matrix to determine whether parties had reached consensus ad idem on the terms, the Federal Court in *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068, reasoned that that question 'could only be gleaned from the mandate letter, the emails/letters and conduct of the parties' and 'not on the subjective mind, but upon a consideration of what was communicated between them by words or conduct ... from the perspective of the notional reasonable man'. In other words the test is an objective one.

[34] I do not agree with the contentions raised by the defendant's learned counsel that the acceptance of the proposal of settlement was not conditional. I find that the letter dated 11 September 2020 shows that the plaintiffs were of the view that this settlement includes the reduction of the PSC rate to RM50 from RM73. This will also have an impact on the amounts due under the previous civil suits filed by the defendant against the plaintiffs. As I have indicated earlier this required a rebuke from the defendant's solicitors denying that the settlement did not include the said disputed PSC rate and the alleged outstanding sums ordered to be paid by the High Court earlier.

[35] Given the above, I am of the view that parties did not come to a complete agreement as to the terms of the settlement agreement. There was still disagreement as to the scope of the settlement and whether the sums that are chargeable and found payable by the summary judgment orders of the court are part and parcel of the terms of a settlement.

[36] This is further exemplified by the defendant's own representation to court on 2 October 2020 where counsel attending indicated that 'Kami diarahkan oleh anak guam kami bahawa pihak-pihak dalam proses berunding terma-terma penyelesaian Tindakan di atas'. I also refer to the letters dated 28 September 2020 exchanged between solicitors confirming the above representations to court.

[37] Given the above, I agree with the position adopted by the plaintiffs. I find that there is no settlement agreement entered between the parties. Under those circumstances, the said letters will now be expunged from the courts records for the purposes of the trial and will not be referred to hereafter by either party at trial. Under those circumstances, I also find that as there was no settlement, the issues raised in the aforesaid letters are now alive issues in contention between the plaintiffs and the defendant subject to the requirement of strict adherence to the pleadings.

WHETHER RES JUDICATA IS APPLICABLE TO THIS CASE

[38] Res judicata is a simple doctrine but at the same time has caused confusion in many legal circles. An erudite explanation of this doctrine can be seen in the judgment of Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46; [2014] AC 160.

[39] In that case, Lord Sumption summarised the legal position as follows:

> Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.

The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336

Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section O 34 of the Civil Jurisdiction and Judgments Act 1982.

Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston*'s Case (1776) 20 State Tr 355. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, p 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, pp 197–98.

Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, p 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

[40] One could summarise that res judicata could be divided into five types:

(a) cause of action estoppel — a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings;

(b) the rule against double recovery of damages as seen in *Jameson and another v Central Electricity Generating Board* [1999] 2 WLR 141 and *Heaton and others v AXA Equity and Law Life Assurance Society plc and another* [2002] 2 AC 329;

(c) doctrine of merger — 'a cause of action as extinguished once judgment has been given on it and the claimant's sole right as being a right on the judgment';

(d) issue estoppel — a party is barred from raising the same issue again even if the cause of action is different in each suit;

(e) rule in *Henderson v Henderson* (1843) 3 Hare 100 at p 115 — a party is 'precluded from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones'; and

(f) general procedural rule against abusive proceedings — policy underlying all of the above principles.

[41] I have summarised the issues raised by the defendant in para 2 earlier and I am of the view that these issues could be grouped into two main issues as follows:

(a) the plaintiffs claims, or issues raised in these proceedings have been raised in the earlier suits and were disposed of by the learned judge in those proceedings — combination of issue estoppel and the rule in *Henderson v Henderson* (issue 1); and

(b) that the plaintiffs are guilty of abusing the process of this court by having their claims filed in multiple suits and these should have been raised in a single proceeding relating to the same subject matter.

[42] Firstly, on the issue of issue estoppel, I am of the view that the decision of the courts in the earlier suits did not preclude the plaintiffs from filing these proceedings against the defendant.

[43] The defendant contends that the issue of negligence and breach of contract raised by the plaintiffs in these proceedings were raised in the affidavits of the plaintiffs in response to the plaintiffs' application to obtain summary judgment against them. In those proceedings, the plaintiffs attempted to raise the issue of negligence and breach of contract, although not pleaded in its defence, as an issue to justify for the defendant's claim for the PSC sums to be referred to at trial.

[44] This allegation was rejected by my learned sister Justice Azimah as follows:

> [93] Clause 3(n) of the COU 2017 clearly provides that the defendant *shall not be entitled to make any set off or deduction* of any claim it may have against the plaintiff from the Airport Charges (which includes PSC):
>
> > (n) You shall not be entitled, in respect of any claim you may have against us or otherwise, to make any set off against or deduction from the Airport Charges payable to us where you have entered into these Conditions of Use in the capacity of a vendor of services at the Airport.

A [94] Clause 3(n) further reinforces the fact that the PSC Rate is statutorily prescribed and is totally independent of any dispute any aviation service providers might have against each other. No dispute as to performance can deter or diminish the statutory PSC Rate payable. If indeed there are any qualms regarding performance, those qualms are entirely a separate matter which should be pursued B separately and not made against (or to set off) the imposition or the imposed rate of the statutorily prescribed PSC Rate. This court reiterates that it shall not be manipulated to be the defendant's leeway to a 'backdoor' review of the Commission's decisions.

C **[45]** What is important is that the learned judge did not deal with the merits of the plaintiffs' claim for breach of contract or negligence as alleged. The learned judge only held that the terms of the contract did not allow for the plaintiffs to set off any sums against the outstanding PSC. My learned sister had only dealt with the issue of the outstanding PSC which she found were due D and payable by the plaintiffs and did not find that the claims for breach of contract or negligence were without merit.

[46] I refer to the decision of our courts in *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 and in *Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors (No 2)* [1999] 4 MLJ 94. E

[47] The mechanism in which a court of law should approach the issue of res judicata was laid down by Mahadev Shankar JCA in *Prestasia Sdn Bhd v Mow Wai Lan* where he stated:

F As to res judicata, Mr Edwin Lim referred us to *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 which applied the judgment of the Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49; [1964] AC 993. Chang Min Tat FJ held that since it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, the plea of res judicata must fail.

G Had Zakaria Yatim J necessarily and with precision determined the counterclaim, he would have had to make an order dismissing it. That he certainly did not do so, and his omission was undoubtedly influenced by Mr Jaspal Singh's submission that it should be the subject of a separate writ.

H ...

As stated in *Carl Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 (referred to in PS Gill J's judgment at p 473), the first question is: 'Was the same question decided in the earlier proceedings?'.

I In our view, decidedly not! Zakaria Yatim J left the company to proceed for the tribute in a separate action. The stand taken by Mr Jaspal Singh before Rahmah Hussain J and indeed by Mr Natarajan before us may be mitigated by supposing that the latter did not know and the former had forgotten what had happened before Zakaria Yatim J. Regrettably, his notes of evidence did not form part of the appeal record before us, and in the interests of justice, we felt obliged to call for it. In the light of what we now know, we think it was impermissible for them to

advance a submission which was a total departure from the basis on which Mr Jaspal Singh obtained his order. The plea for res judicata was without merit. A

[48] Therefore, as my learned sister did not deal specifically with precision on the issue of the alleged claims pending in these proceedings, I do not find that the plaintiffs claim are barred by res judicata in the narrower sense ie cause of action estoppel. The previous court had only found that the right of set off was removed by the terms of the agreement and therefore the sums due under the same becomes payable if full. This does not mean that the plaintiffs' claim was dismissed based on their merits but were only left out of the equation due to the terms agreed between parties. B C

[49] I refer to the decision of the Federal Court in *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157; [1985] CLJ Rep 242 where Salleh Abas LP stated: D

> *What is set off?*
>
> A set off is a crossclaim for a sum of money by a defendant against a plaintiffs' claim for another sum of money for which the defendant is being sued. A crossclaim is not necessarily a set off, merely because the word used in the pleading is 'set off'. Whether or not the plea is a set off it has to be determined as a matter of law and substance: *Hanak v Green* [1958] 2 QB 9. A crossclaim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiffs' claim. See *In re A Bankruptcy Notice* [1934] Ch 431. *But to constitute a set off the sum of money meant as a crossclaim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiffs' claim and not as a separate cause or matter.* E F
>
> ....
>
> *What then is a counterclaim?*
>
> A counterclaim on the other hand is also a crossclaim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiffs' action in order to avoid multiplicity or circuity of suits. Like set off, a counterclaim is also the creation of statutes. At common law the court has no power to allow an action by a plaintiff to be met by a crossclaim of the defendant against the plaintiff. The court simply left the defendant to commence a separate action. It was only by virtue of the Supreme Court of Judicature Act 1873, s 24(3) that enabled the defendant's counterclaim to be added to the plaintiffs' suit. G H
>
> ... I
>
> It is, therefore, clear that a counterclaim is wider than a defence of set off and that whilst the former is a separate action by a defendant against a plaintiff the latter is essentially a defence, although a defendant is entitled to add it as a counterclaim. Being a defence to a plaintiffs' action, the matter sought to be set off must essentially

be connected with or form part of the matter upon which the plaintiffs' action is founded. Indeed Mr Cecil Abraham conceded this point.

[50] Therefore, since the plaintiffs is contractually bound not to raise the issue of its claim as a set off against the defendant's claim they should still be allowed to have these issues ventilated and determined by a way of a fresh claim or a counterclaim if they deem appropriate. The fact that they chose not to file a counterclaim in the earlier proceedings does not mean that they are barred from pursuing the same by way of a fresh proceeding.

[51] The fact that the agreement precludes the right to set off the plaintiffs' claim against the sums due to the defendant does not mean that the right to sue for failure to perform the contractual obligation or negligence is precluded under contract.

[52] This issue will have to be determined at trial and not summarily. After all the Contracts Act 1950 precludes or renders any contractual terms that attempt to preclude the contractual obligation void or prevent the right to file a claim void.

[53] I refer to ss 29 and 30 of the Contracts Act 1950 and the Federal Court's decision in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2018] 1 LNS 1887 and the decision of the High Court in *Nowran Begam binti Mohamed Saliff (Pentadbir Hart Pusaka Mohamed Ihsan bin Saiyed Abu Thahir, si mati) v Nantha Kumar Devar a/l Sangaran & Anor (CTRM Aviation Sdn Bhd, intervener)* [2016] MLJU 226; [2016] 7 CLJ 760. As such, I cannot say at this stage that because of the right of set off is precluded by the terms of the contract, the plaintiffs is not entitled to file a counterclaim. If the clause prevents the plaintiffs from pursuing its claim totally against the defendant, then such a clause may fall foul of the aforementioned s 29 of the Contracts Act. I am of the opinion that this issue should be dealt with and determined by way of a full trial and not summarily at this interlocutory stage.

[54] I also note that this right to choose either to bring a fresh claim or to file a counterclaim in the earlier proceeding is enshrined in O 15 r 2 of the Rules of Court 2012 which I reproduce below:

> (1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he shall add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

(4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

[55] I also refer to the judgment of Augustine Paul JC (as he then was) in *Au Yong Kun Min v Tractors Malaysia Bhd* [1996] MLJU 613, where he stated:

> It must be observed that the rules of set off and counterclaim are for the benefit of defendants, and plaintiffs cannot compel defendants to avail themselves of those benefits by requiring them to add such claims to actions brought by them (see *Morton v Bailey* 2 Ill 213). Everyone should have the right to try his own case in his own way. It may require time for the development and discovery of the nature and extent of the damage arising from a counterclaim and a rule requiring him to litigate it at the option of his adversary might deprive him of the value of it (see *Ayres v Bensley* 32 Cal 620). *The general rule, therefore, is that a defendant having an independent claim available as a counterclaim, whether in contract or tort, has the option either to plead it as such or to reserve it for a future independent action, and in the latter event the former judgment will not operate as a bar or estoppel* (see *Cumberland Glass Mfg Co v De Witt* 237 US 447). Thus, where in an action involving title the defendant claims under a deed, the judgment determining that the description in such deed is insufficient to cover the premises in question does not bar a subsequent suit to reform the description, even though this relief might have been obtained in the first action (see *Wimpy v Lawrence* (Mo) 208 SW 54). A warehouseman's claim for storage though a proper matter for counterclaim in previous actions by the owner of the stored chattels, one for conversion of part of them and the other for damages for injuries to another portion of them, if not asserted, is not barred by a judgment against him even though he unsuccessfully asserted a lien in the action for conversion (see *Diamond Ice & Stor Co v Klock Produce Co* 102 Wash 369).
>
> *However, a claim or demand which might have been but not asserted in a prior action may depend upon some fact or issue involved in and adjudicated in that action, as where it is conditioned upon the existence or non-existence of some fact or state of facts which also constituted the basis or an essential element of the cause of action previously adjudicated or of a defence which was made or might have been made in the first action, and which was therefore adjudicated by an adverse judgment.*
>
> Under such circumstances it is clear that the judgment would operate as an estoppel in an independant action on such a claim (see *Blodgett & O Co v George S Lings & Co* 194 Fed 5690; *Port of Melbourne Authority v Anshun Proprietary Ltd* (1981) 147 CLR 598). The test of one's right to recover in a second action, after having waived his counterclaim in the first is: *Can all the facts necessary to support the judgment rendered against him exist at the same time with the facts necessary to support the*

A *counterclaim sought to be enforced in the second suit?* For if, in order to recover in the first action, the plaintiff must have shown the falsity of the allegations made by the defendant in the second suit, then the former suit is a bar (see *Pindel v Holgate* 221 Fed 342). If, however, the nature of the counterclaim is such that it need not be negatived in establishing the cause of action, the judgment will not bar its
B subsequent assertion. The mere fact that the two claims arose out of the same contract or transaction would not alone alter the general rule. In such cases the effect of the judgment depends upon whether it adjudicates some matter essential to the maintenance of the subsequent action. If it does and the fact or matter so adjudicated is inconsistent with or negatives the right of the defendant to maintain
C a subsequent independant action it would, of course, if properly presented therein as an estoppel, defeat such an action (see *Loe v Bjorkman Bros* 146 Minn 471).

[56] I am of the opinion that the plaintiffs claim are not caught under this subset of the doctrine of res judicata. As I have alluded earlier, the plaintiffs are
D entitled to bring a separate claim against the defendant. The claim for breach of contract, negligence and damages sought for failure to perform the contract is separate and distinct from the claim of the PSC charges by the defendant.

[57] I also find that since the defendant contends that the plaintiff is not
E entitled to set off the said sums, then the same issues could not have been raised in the earlier proceedings and need not have been raised in the said suits. The rule in *Henderson v Henderson* is to prevent abuse of the process of court. As the rules provide that the plaintiffs are entitled to choose which route to take, this cannot be considered to be abusive.

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[58] Finally, I also find that the fact the plaintiffs have filed multiple proceedings not just against the defendant but also MAVCOM does not mean that the plaintiffs have committed an abuse of process. The plaintiffs are entitled to challenge MAVCOM's decision by way of judicial review
G proceedings if it deems fit to do so. That is a right provided under law and separate to the grievances they have against the defendant. The claim against MAVCOM concerns an alleged failure by a public body to comply with its general obligation under public law whereas the issue with the defendant deals with private rights under the terms of the contract and the services that
H allegedly should have been provided to the plaintiffs.

[59] I quote the judgment of Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1:

I ... But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as

a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. *It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.* Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

[60] This view remains good law as seen in Lord Sumption's judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats* where he clarified the applicable principles of law:

The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung*. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v Gore-Wood & Co* [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiffs' claim should have been made in an earlier action on the same subject-matter brought by a company under his control. Lord Bingham took up the earlier suggestion of Lord Hailsham of St Marylebone LC in *Vervaeke v Smith* ...

25 It was clearly not the view of Lord Millett in *Johnson v Gore-Wood* that because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of res judicata. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v GoreWood* was inevitably on

abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D-E, and so do I). Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. *In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, 'estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process'.*

[61] I am of the opinion as the plaintiffs are entitled to bring a separate counterclaim to address their grievances and that this is a separate claim to those raised by the defendant in the earlier suits, the plaintiffs are not subjected to the rule in *Henderson v Henderson*. This suit is not an abuse of the process of court and does not abrogate from the rule that all the claims that should have been raised in the civil suit be raised in a single proceeding.

[62] I do not find that there is any risk that even if this claim is decided in favour of the plaintiffs, the judgment of this court will contradict the judgment of my learned sister in the earlier suit. This current claim is independent to the suit filed for the charges allegedly claimable by the defendant. The same applies to the claim filed by the plaintiffs against the decision of MAVCOM.

[63] On the issue of approbating and reprobating as alleged by the defendant, I am of the view that this argument does not render the plaintiffs' claim abusive. Such an argument should be raised as part of the merits of the claim and will be taken into account as it goes as to the consistency and validity of the plaintiffs' claim.

[64] I am of the view that the defendant's allegation on this issue does not justify the striking out of the plaintiffs claim. However, the defendants are entitled to rely on this defence during the course of the trial and I will not make any final determination on this issue until the trial is disposed of.

[65] Given the above, I find that the plaintiffs' claim is not subject to the doctrine of res judicata in any of the limbs suggested by the defendant.

ORDERS OF THIS COURT

[66] Based on the aforesaid I dismiss the defendant's application with costs in the cause.

Defendant's application dismissed with costs in the cause.

Reported by Dzulqarnain Ab Fatar